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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; and ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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34 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
A. Petitioners Suffered No Injury in Fact, But Instead Asserted Lobbyists' Mere Value Interests, Which Are Insufficient to Confer Article III Standing	11
B. Petitioners Are Nor At All Akin to a Legislature	15
C. Even if Petitioner Park Is Viewed As An Individual "Legislator," Petitioners lack Standing	20
D. Article XXVIII's Authorization of a Private Right of Action in State Court – Essentially Allowing Taxpayer or Citizen Lawsuits – Does Not Confer Standing Under Article III	24
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 10, 20, 21, 24

Burke v. Barnes, 479 U.S. 361 (1987) 16

Coleman v. Miller, 307 U.S. 433 (1939) 16, 17, 18, 27

Diamond v. Charles, 476 U.S. 54 (1986) ..... *passim*

Don't Bankrupt Washington Comm. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 460 U.S. 1077 (1983) 17

Doremus v. Board of Education of Hawthorne, 342 U.S. 429 (1952) 11, 26, 27

Fairchild v. Hughes, 258 U.S. 126 (1922) 26

Flast v. Cohen, 392 U.S. 83 (1968) 11, 13, 25

Frothingham v. Mellon, 262 U.S. 447 (1923) 26

Karcher v. May, 484 U.S. 72 (1987) ..... *passim*

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 26

Sierra Club v. Morton, 405 U.S. 727 (1972) 9, 13, 14

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 12

Tileston v. Ullman, 318 U.S. 44 (1943) 26

United States v. Richardson, 418 U.S. 166 (1974) 25, 26, 29

United States v. SCRAP, 412 U.S. 669 (1973) 12

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 25, 26, 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES

U.S. Constitution, Article III 7, 8, 14, 15

Arizona Constitution, Article XXVIII, Section 4 ..... *passim*

Arizona Revised Statutes § 13-904 23

Arizona Revised Statutes § 35-213 25

Arizona Revised Statutes § 38-231 3

Arizona Revised Statutes §§ 41-1231 to 1239 18

5 U. S. C. § 702 28

28 U.S.C. § 2403(b) 7, 8

OTHER AUTHORITIES

Arizonans for Official English, Statement of Contributions, State of Arizona (Sept. 1, 1988) 4, 6

Arizonans for Official English, Statement of Contributions, State of Arizona (March 24, 1989) 7

United Press International, Regional News, Arizona-Nevada, Dateline Phoenix (July 6, 1988) 3

U.S. English Foundation, Inc., IRS Form 990, Calendar Year 1988 (Nov. 14, 1989) 5

U.S. English Foundation, Inc., IRS Form 990, Calendar Year 1989 (Nov. 12, 1990) 5, 6

U.S. English Foundation, Inc., IRS Form 990, Calendar Year 1990 (Nov. 15, 1991) 7

TABLE OF AUTHORITIES – Continued

Page

U.S. English Legislative Task Force, Inc., IRS Form 990, Calendar Year 1988 (Nov. 14, 1989)..... 7

U.S. English Legislative Task Force, Inc., IRS Form 990, Calendar Year 1989 (Nov. 15, 1990).....6, 7

Daniel Weintraub, *Crime, Immigration Issues Helped Wilson; Proposition 187 Wins Among Whites, But Loses Among All Other Ethnic Groups, Exit Survey Shows*, L. A. Times (Nov. 9, 1994)..... 19

INTEREST OF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. Language discrimination has adversely affected Latinos in many areas, such as education, employment, and voting rights. "Official English" and English-only laws epitomize such discrimination, and MALDEF has taken a strong role in opposing such measures. MALDEF thus has a strong interest in this case.

This brief addresses the first question set forth in the Court's Order of March 25, 1996: "Do petitioners have standing to maintain this action?" *JA.* at 212. MALDEF respectfully submits that this question has not been adequately addressed by the Petitioners, by the Respondents, or by the parties' various *amici curiae*. All parties have consented to the filing of this brief. Letters of consent have been filed with the Court.

Should the Court disagree with *amicus* that Petitioners lack standing to maintain this action and should the Court reach the merits, MALDEF urges the Court to affirm the decision of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

While several Respondents do question Petitioners' Article III standing in this case, none of the briefs adequately addresses the record or relevant facts pertaining to the issue. *Amicus curiae* accordingly does so here.

Following the District Court's decision on the merits of this case declaring Article XXVIII unconstitutional, 730 F. Supp. 309 (D. Ariz. 1990), Governor Mofford, the only

remaining defendant, announced that she would not appeal the court's decision, and, in fact, she never did appeal.

Ten days after the District Court's decision on the merits, Petitioners Arizonans for Official English ("AOE") and Robert D. Park filed a motion to intervene. *J.A.* at 94. The motion was supported by a single affidavit -- that of Robert D. Park. *Mot. to Intervene, Ex. B, Aff. of Robert D. Park (Feb. 12, 1990)* (hereinafter *Park Aff.*). Park stated that he had been a resident of Prescott, Arizona, "for over ten years," and he also stated in relevant part:

> I was and still am Chairman of the Arizonans for Official English Committee.
>
> I solicited signatures for petitions to place the initiative for a constitutional amendment upon the ballot, campaigned for and voted for what the voters passed in 1988 as the Amendment XXVIII to the Arizona Constitution.
>
> The Committee expended in excess of $307,000.00 to obtain signatures to place the initiative on the ballot and promote the passage of it. The Committee is backed by 9,769 U.S. English members in Arizona. The Committee was the sole organization gathering signatures to place the initiative measure on the ballot, more than 1,000 volunteers gathered signatures for the Committee. The Committee gathered more than 200,000 signatures.
>
> I believe that Amendment should remain part of the Arizona Constitution because the voters of the State of Arizona determined that it should be part of that Constitution. If the Committee and Park are not allowed to intervene in this case and appeal the decision holding the Amendment unconstitutional, all that effort and expense will have been wasted.
>
> • • •
>
> The Committee and I believe the Governor has a duty to appeal from the court's decision in this matter under the oath of office to which she swore which is set forth at Arizona Revised Statutes § 38-231. The failure and refusal of Governor Mofford to do so is the reason for this motion to intervene in order to appeal.

Park Aff. at 1-3 (paragraphs omitted and asterisks added).

Park in his affidavit provided no further description or characterization of AOE. Nevertheless, the District Court, in its decision denying intervention, characterized AOE as "the main proponent of the initiative that placed Article XXVIII on the ballot." *J.A.* at 142.[1]

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[1] This is supported in the record by Park's statement that AOE "was the sole organization gathering signatures to place the initiative measure on the ballot." *Park Aff.* at 2. Not revealed in Park's affidavit, however, is the fact that the volunteer circulators who gathered the petition signatures were *paid* to gather the signatures. According to the U.P.I. wire service, "American Petition Consultants, of Sacramento, Calif." was paid "up to one dollar per signature" and circulators "received 35 cents per signature, but were eligible for 'quantity' bonuses of up to 55 cents per name." *United Press International, Regional News, Arizona-Nevada, Dateline Phoenix, July 6, 1988.* Although the record does not disclose how much was paid to the individual circulators, public documents reveal that AOE paid

(continued...)

Apart from the brief references in Park's affidavit, there is no evidence in the record as to exactly what kind of an organization the Arizonans for Official English Committee was or is. This led the District Court, during argument on the motion to intervene, to ask counsel for Petitioners, "What kind of an organization is the Committee?" *J.A.* at 127. Counsel responded that it was a "political action committee which was instituted for the purpose of circulating petitions to get this initiative on the ballot." *Id.*

The District Court followed up by asking, "Unincorporated association, is that it?" to which counsel replied, "Yes." *Id.*[2] Petitioners similarly have represented to this Court that AOE "is an unincorporated association and has no parents or subsidiaries." *Pet'r Br.* at ii.

As to whether AOE is a membership organization, nothing in the record establishes this as fact. To the contrary, Park stated in his affidavit only that AOE was "backed" by the members of another group, a national organization known as U.S. English: "The Committee is backed by 9,769 U.S. English members in Arizona." *Park Aff.* at 2.

Although there was nothing else in the record before the District Court about the relationship between AOE and

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[1](...continued)
$111,142 to American Petition Consultants for "[s]ignature and petition expenses." *Arizonans for Official English, Statement of Contributions, State of Arizona* (hereinafter *AOE 1988 Contribs. Statement*), at Schedule D, p. 5 (Sept. 1, 1988) (brackets added).

[2] The District Court was troubled by the status of AOE as an unincorporated association, raising questions about its capacity to be a litigant. *See J.A.* at 133, 142-43. Despite its reservations, the District Court denied intervention on other grounds. *See infra.*

the national organization known as U.S. English (or as U.S. English Foundation, Inc.[3]), it is a matter of public record that AOE is quite close to U.S. English and to its lobbying arm, the U.S. English Legislative Task Force, all of whom contributed to and lobbied for the English-only ballot initiative in Arizona that became Article XXVIII.

U.S. English official Cameron Whitman, in an affidavit filed in the Ninth Circuit, described U.S. English as "the largest organization promoting English as the official language of the United States," and as having "actively promoted and supported the fourteen [state] constitutional amendments and statutes declaring English the official languages [sic]" enacted since 1983. *Aff. of Cameron Whitman, at 1 (May 3, 1990), J.A.* at 153. U.S. English itself has represented to this Court that it is a nationwide membership organization which "assisted in the initiative" that became Article XXVIII. *Br. of U.S. English Amicus Curiae* at 1.

During calendar year 1988 -- the year in which the English-only initiative qualified for and appeared on the Arizona ballot, U.S. English contributed $285,000 to its lobbying arm, the U.S. English Legislative Task Force ("Task Force"). *U.S. English Found., Inc., IRS Form 990, Calendar Year 1988, at Unclassified Schedule IV (Nov. 14, 1989).*

During the following year, 1989, U.S. English contributed $145,000 to the Task Force. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1989, at Schedule A, p. 5 (Nov. 12, 1990).* As U.S. English explained this transfer of funds, "U.S. English Foundation gave a lobbying grant to the

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[3] In its 1988 federal tax return, the U.S. English Foundation, Inc., explained: "On July 1, 1988, all assets and liabilities of U.S. English <a project of U.S.> were transferred to U.S. English Foundation, Inc." *U.S. English Found., Inc., IRS Form 990, Calendar Year 1988, at Unclassified Schedule I (Nov. 14, 1989).*

Task Force." *Id.* This $145,000 lobbying grant from U.S. English constituted more than 99% of the contributions and grants received by the Task Force that year, as it received only $310 in additional contributions and grants. *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 1 (Nov. 15, 1990).*

The relationship between U.S. English and the Task Force is not limited to the former funding the latter, as they "have common control": "More than 25% of the directors sit on each board. They also have a historic and continuing relationship, participating in joint work efforts." *U.S. English Found., Inc., IRS Form 990, Calendar Year 1989, at Schedule A, p. 5 (Nov. 12, 1990).*

According to the Task Force, its nearly-exclusive work effort or program service is: "Lobbying to promote the adoption of the English language as the 'official' language of the United States." *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 2 (Nov. 15, 1990).*

AOE fits neatly into this web in part as a recipient of funding primarily from the Task Force and also somewhat from U.S. English itself. For example, AOE reported to the State of Arizona in 1988 that it had received $157,246 in contributions from all sources from January 1, 1988 through August 24, 1988, covering most of the period during which Petitioner sought to qualify the English-only initiative for the statewide ballot. *AOE 1988 Contribs. Statement*, at 1. Of this total of $157,246 in contributions, AOE received $154,864 from the Task Force. *Id. at Schedule B & Schedule G.*[4]

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[4] During this time period, AOE paid American Petition Consultants more than $110,000 for signature and petition expenses. *See supra* note 1. Also on the expenditure side in this period, AOE paid $7,190 to the Task Force for "[t]ravel and misc. expenditures." *AOE 1988 Contribs. Statement, at Schedule D, p. 5.*

For all of calendar year 1988, AOE received a total of $306,756 in contributions; $304,344 of this sum -- more than 99% of the total -- was received from the Task Force. *Arizonans for Official English, Statement of Contributions, at Schedule B & Schedule G (March 24, 1989).*[5]

Petitioner Robert D. Park also was tightly tied into this interlocking web connecting AOE, the Task Force, and U.S. English. During 1988 and through at least February 12, 1990, Park of course served as Chairman of AOE. *Park Aff. at 1.* In 1988 and 1989, Park served as one of the three Directors of the Task Force. *U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1988, at 4 (Nov. 14, 1989); U.S. English Legis. Task Force, Inc., IRS Form 990, Calendar Year 1989, at 4 (Nov. 15, 1990).* In 1990, Park became a Director of U.S. English. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1990, at Statement 4 (Nov. 15, 1991).*

Although little of the foregoing was brought to the attention of the District Court in this case, the court nevertheless denied Petitioners' motion to intervene in part on the grounds that AOE and Park did not satisfy the injury-in-fact requirement necessary for there to be a justiciable controversy under Article III of the U.S. Constitution. *J.A.* at 133-37, 142-49, 130 F.R.D. 410 (D. Ariz. 1990).[6]

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[5] In the following year -- calendar year 1990 -- U.S. English contributed $33,000 directly to Arizonans for Official English. *U.S. English Found., Inc., IRS Form 990, Calendar Year 1990, at Statement 5 (Nov. 15, 1991).*

[6] Attorney General Robert Corbin, who earlier had sought and won dismissal as a party defendant, reversed his position and sought to intervene under 28 U.S.C. § 2403(b), which allows intervention by a state attorney general in an action in which an "officer" of the state "is not a party." The District Court denied this

(continued...)

On appeal, a Ninth Circuit panel reversed. *J.A.* at 157, 939 F.2d 727 (9th Cir. 1991). According to the Ninth Circuit, which cited and purported to rely on *Diamond v. Charles*, 476 U.S. 54 (1986), and on *Karcher v. May*, 484 U.S. 72 (1987), both AOE and Park have Article III standing.

Both AOE and Park, the Ninth Circuit assumed and asserted, performed roles in the Arizona ballot initiative process closely analogous to that of a state legislature. *See J.A.* at 165, 939 F.2d at 732. Ultimately, the Ninth Circuit ruled that only AOE, in the context of a state ballot initiative, was analogous to a state legislature, and thus had Article III standing. *See J.A.* at 167, 939 F.2d at 733.

The Ninth Circuit also ruled that AOE's Robert Park had Article III standing to appeal the District Court's ruling on the merits. The court premised this conclusion on the fact that section 4 of Article XXVIII confers "standing" upon "a person who resides in or does business in this State . . . to bring suit to enforce this Article in a court of record of the State," *J.A.* at 25; on the possibility "that Park *could* have sued Yniguez to enforce" Article XXVIII; on the assertion by AOE and Park that they had been told this lawsuit was being defended by the Attorney General;[7] and on

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[6](...continued)
§ 2403(b) motion on the grounds that Governor Mofford obviously was "a party" to this action. *J.A.* at 132, 141.

[7] The only reference to such a matter in the record is a somewhat different statement by Park in his affidavit:

> Neither the Committee nor I attempted to intervene earlier in this action because the Amendment was being defended by the Attorney General of the State of Arizona and his assistants.
>
> (continued...)

the unsupported conclusion that plaintiff "Yniguez could have had a reasonable expectation that Park (and possibly AOE as well) would bring an enforcement action against her." *J.A.* at 169-71 (emphasis added), 939 F.2d at 734.[8]

Additional proceedings occurred, leading to the Ninth Circuit's *en banc* decision on the merits now under review.

SUMMARY OF ARGUMENT

A. As lobbyists -- like most other lobbyists -- AOE and Park concededly have strong value interests in any litigation which may have a potentially negative effect on a law for which they lobbied. But Petitioners' personal and professional value interests in defending the ballot initiative they supported and lobbied for are not sufficient to confer Article III case-or-controversy standing. *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986); *cf. Sierra Club v. Morton*, 405 U.S. 727 (1972) (heightened interest and historic commitment irrelevant to standing). Nor may AOE and Park be deemed to have suffered any injury-in-fact by virtue of their alleged financial loss, given that the loss was not caused by the initiative as adopted, but instead involved time and money that they voluntarily expended in lobbying for the initiative.

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[7](...continued)
> Thus our rights and interests were being protected by such representation and separate representation would have been duplicative and contrary to judicial economy.

Park Aff. at 3.

[8] Contrary to the Ninth Circuit's speculation, there is nothing anywhere in the record indicating that AOE or Park ever even contemplated filing suit against the Arizona, much less against plaintiff Yniguez.

B. In *Karcher v. May*, 484 U.S. 72 (1987), this Court recognized that a state legislature, as well as the elected heads of the legislature authorized to act on its behalf, have standing to defend a law that the legislature enacted. *Karcher*, however, lends no support to Petitioners' standing here.

1. AOE and Park, in the context of a state initiative, cannot be characterized by analogy as a legislature, given that the legislature here was comprised of all the registered voters of Arizona, or at least the more than one million Arizonans who voted upon the English-only initiative.

2. Nor can lobbyists AOE or Park be characterized as the authorized representative of the voter-legislators. AOE was not even a voter in this "voter-legislature." And AOE and Park had none of the characteristics of the elected legislative leaders who defended the legislatively enacted law in *Karcher*, and whose elected replacements in office were recognized by this Court as the appropriate parties to withdraw the appeal.

C. Even if precedent allowed the expansion of *Karcher* to encompass some degree of legislator standing, and even if the Court were inclined to extend that concept to the initiative context with regard to voter-legislators, this Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986), precludes such a result. In *Bender*, where the full school board unsuccessfully defended its challenged policy and then declined to appeal, this Court ruled that the sole dissenting board member did not have Article III standing to appeal on his own.

D. Finally, standing may not be conferred on Petitioners by virtue of Article XXVIII's authorization of a private right of action in state court. A similar authorization -- allowing taxpayer lawsuits -- was long ago rejected by this Court and deemed insufficient to confer case-or-controversy

standing. *Flast v. Cohen*, 392 U.S. 83 (1968). This Court, in fact, has long denied standing to mere residents, citizens, taxpayers, and private-attorneys-general even where standing has been state-conferred. *Doremus v. Board of Educ. of Hawthorne*, 342 U.S. 429 (1952).

ARGUMENT

A. Petitioners Suffered No Injury in Fact, But Instead Asserted Lobbyists' Mere Value Interests, Which Are Insufficient to Confer Article III Standing

The posture of this case is nearly identical to that in *Diamond v. Charles*, 476 U.S. 54 (1986). This Court's decision in *Diamond* compels the denial of standing to AOE and Park here. Petitioners seek to vindicate mere value interests. Even if -- as professional lobbyists -- they collected and expended substantial amounts of money to vindicate their particular value interests, that fact cannot convert the interests into a direct and concrete stake in this action.

In *Diamond*, after Illinois declined to appeal a lower court decision holding portions of a state abortion law unconstitutional, defendant-intervenor Diamond sought review by this Court "based upon his personal status as a doctor, a father, and a protector of the unborn." *Id.* at 66. In the course of "reject[ing] Diamond's claims that his personal and professional interests confer standing," the Court stated:

> Although Diamond's allegations may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the Illinois Abortion Law as written be obeyed. Article III requires more than a desire to vindicate value interests. It requires an "'injury in fact'"

> that distinguishes "a person with a direct stake in the outcome of a litigation -- even though small -- from a person with a mere interest in the problem." Diamond has an interest, but no direct stake, in the abortion process. This "abstract concern . . . does not substitute for the concrete injury required by Art. III."

Id. at 66-67 (ellipsis by Court), *citing United States v. SCRAP*, 412 U.S. 669, 687, 689 (1973), *and Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

The Court further characterized "Diamond's attempt to maintain the litigation" after the state had abandoned it as "simply an effort to compel the State to enact a code in accord with Diamond's interests." *Diamond*, 476 U.S. at 65. The Court concluded that, "[b]ecause the State alone is entitled to create a legal code, only the State has the kind of 'direct stake'" required for Article III standing. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

The Court in *Diamond* additionally rejected as injury-in-fact Diamond's financial loss from an assessment of attorney's fees against him. The Court concluded that any financial loss was a "consequence" of Diamond's voluntary decision to intervene rather than an injury that could "fairly be traced to the Illinois Abortion Law" itself. *Diamond*, 476 U.S. at 70.

The interests that AOE and Park assert here are of essentially the same nature as the value interests asserted by Dr. Diamond. As Park stated in his affidavit: "I believe that Amendment should remain part of the Arizona Constitution because the voters of the State of Arizona determined that it should be part of that Constitution." *Park Aff.* at 2.

Like Dr. Diamond's asserted interests, the interests of AOE and Park are purely value-based interests -- their desire

to see the state enact and enforce a law against the use of languages other than English. They have never alleged any interest other than the desire to vindicate this particular value belief; neither protector of English has ever shown how the non-enforcement of Article XXVIII harms them in any way other than in their value sensibilities.

AOE and Park have, however, often referred to their lobbying expenditures as a direct and concrete injury. They claim that all of their "effort and expense will have been wasted" unless they are permitted to defend Article XXVIII. *Park Aff.* at 2. They assert that this "nullification of AOE's efforts creates injury."[9] *Pet'r Br.* at 46.

But, all that these efforts prove is that AOE and Park promoted their value beliefs to a greater extent than many others. Thus, they are active, *lobbyist* value holders rather than passive value holders. That they collected and expended large amounts of money merely means that they are professional lobbyists. Still, at bottom, their lobbyist interest is no less a value interest than Dr. Diamond's.

This Court long ago rejected prominence, long establishment, or great expenditure as a basis for distinguishing the standing of value promoters. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court rejected the standing of the Sierra Club, concluding that "a mere 'interest in a problem,' no matter how longstanding the interest and

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[9] In addition to the defects identified here, Petitioners' nullification theory likely could not survive another test of standing doctrine. Because this case involves a substantive challenge to Article XXVIII rather than a procedural challenge to the manner of its adoption, it is doubtful that there is a sufficient nexus between the declaration that the law is substantively unconstitutional and the alleged "nullification" of AOE's and Park's lobbying efforts and expenditures. *See Flast v. Cohen*, 392 U.S. 83, 102 (1968) (explaining nexus requirement).

no matter how qualified the organization is in evaluating the problem, is not sufficient" to grant standing. *Id.* at 739.[10] The Court's explanation demonstrates why AOE's and Park's status as established, professional lobbyists cannot distinguish them from Dr. Diamond:

> The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona-fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Id. at 739-40.

AOE and Park are certainly no larger, well-established, or more committed to their cause than the Sierra Club is to its cause. What applied to the Sierra Club applies with equivalent force to AOE and Park.

In contrast, under the theory urged by AOE and Park, any lobbyist who expended any amount of effort or money on promoting a law could intervene to defend that law. As explained in *Sierra Club*, this right to intervene could

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[10] Although the Court was construing standing under the Administrative Procedure Act, its discussion in *Sierra Club* is equally applicable to Article III standing.

not be limited to expert organizations or prominent organizations. Anyone who engaged in any amount of lobbying could gain access to the federal courts. The mere writing of a letter to a congressperson or state legislator would qualify an individual to defend a law that he or she supported.

But, the Court's well-established doctrines of standing foreclose this result. *Diamond* itself rejects the idea that lobbying expenditures can support Article III standing. The Court characterized Dr. Diamond's intervention in the litigation itself as a voluntary lobbying effort -- "an effort to compel the State to enact a code in accord with Diamond's interests." 476 U.S. at 65. The Court then rejected Diamond's financial loss from that lobbying effort -- in the form of an award of attorney's fees -- as a basis for standing. AOE and Park are wholly indistinguishable from Dr. Diamond.

B. Petitioners Are Not At All Akin to a Legislature

In further support of their standing, AOE and Park assert that, in the context of voter-enacted initiatives, they are like a state legislature. The Ninth Circuit similarly concluded as to AOE and Park:

> As the principal sponsors of Article XXVIII, their relationship to Article XXVIII is closely analogous to the relationship of a state legislature to a state statute.

J.A. at 165, 939 F.2d at 732. Relying on this Court's decision in *Karcher v. May*, 484 U.S. 72 (1987), the Ninth Circuit conferred standing on AOE, concluding that AOE "stands in an analogous position to a state legislature." *J.A.* at 167, 939 F.2d at 733. That analogy fails. AOE and Park are neither the Arizona state legislature nor its authorized representatives with regard to Article XXVIII.

In *Karcher*, when the state Attorney General declined to present a defense, New Jersey General Assembly Speaker Alan Karcher and Senate President Carmen Orechio intervened to defend the constitutionality of a public school minute-of-silence statute enacted by their legislative bodies. Karcher and Orechio, unsuccessful in the lower courts, sought review in this Court. However, by that time, the two had lost their legislative leadership positions. Their successors as Speaker and Senate President withdrew the legislature's appeal, but Karcher and Orechio sought to pursue the appeal as individual legislators. *Karcher*, 484 U.S. at 76, 78. Recognizing that the former legislative leaders had intervened in their official capacities on behalf of the legislature as a whole, this Court dismissed the appeal, holding that "[t]he controversy ended when the losing party -- the New Jersey Legislature -- declined to pursue its appeal." *Id.* at 83.

In his concurring opinion, Justice White pointed out what the Court's decision meant: "that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Id.* at 84 (White, J., concurring in the judgment). Justice White also made explicit what had *not* been decided: "we again leave for another day the issue whether individual legislators have standing to intervene and defend legislation for which they voted." *Id.* at 84-85.

Thus, like prior Court decisions, *Karcher* merely establishes that a state legislature may defend the laws it enacts. *See Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) (assuming arguendo that house of Congress has standing when law it passed is nullified by executive action); *Coleman v. Miller*, 307 U.S. 433 (1939) (state senate standing). The *Karcher* Court did not decide whether any individual legislator or group of legislators have the same right; nor

does it at all address who may defend a voter initiative or referendum.[11]

The *Karcher* decision does not confer standing on AOE or Park here. Neither does the decision's reasoning persuade by analogy or otherwise that these Petitioners ought to be allowed to defend Article XXVIII.

A legislature consists of the *entire* body of individual legislators who vote on the enactment of laws. In the unique context of voter initiatives, only the body of all voters parallels the legislature. Thus, the "legislature" that enacted Article XXVIII includes over one million voters who cast ballots in Arizona's November 1988 general election. Neither AOE -- which is not even a voter or a membership organization, and therefore not even a member of the "legislature" that enacted Article XXVIII -- nor Park, alone or together, could have enacted this initiative. Only the votes of more than half of the one million voters -- each "yes" voter with an individual reason for voting as he or she did -- could have enacted Arizona's 1988 constitutional amendment. AOE and Park thus are not at all analogous to the "legislature" for purposes of Article XXVIII.[12]

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[11] Of course, as the state of Arizona points out in its brief, the Court previously summarily dismissed at least one case filed by an initiative sponsor because "it appear[s] appellant lacks standing to bring this appeal." *Don't Bankrupt Washington Comm. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983).

[12] In *Coleman v. Miller*, the Court conferred standing on twenty members of the Kansas state senate -- who made up half of that body and included all of the senators who voted against the resolution whose validity they challenged. 307 U.S. at 438. Here, AOE and Park not only cannot claim to be the entire Arizona voter-legislature, they also cannot claim to be the body of all voters who supported Article XXVIII's enactment.

(continued...)

Of course, the *Karcher* decision does permit a state legislature to appear in court through its duly-elected leadership -- "its authorized representative," in Justice White's words. AOE and Park assert that they are the "authorized representatives" of the Arizona voter-legislature by virtue of the "specific duties and rights prescribed" by Arizona law for initiative sponsors. *Pet'r Br.* at 43. But, these rights and duties -- to file an application, to comply with regulations in circulating a petition, and to work in explaining the measure to voters -- are not the characteristics of true legislative leaders like Speaker Karcher and Senate President Orechio in *Karcher*.

Instead, Arizona's statutory prescriptions and proscriptions are precisely the kinds of regulations endured and rights enjoyed by all sorts of state and federal lobbyists. Lobbyists can and do draft legislation, they can and do explain their proposals to legislators, and they can and do urge the legislators' support. In exchange, they must typically register as lobbyists and subject themselves to appropriate government regulation. *See, e.g.,* Ariz. Rev. Stat. §§ 41-1231 to 1239 (registration and other lobbyist regulations.) However, that hardly means that lobbyists should be permitted to pose as "authorized representatives" of the legislature in defending laws once passed.

In *Karcher* itself, none of the characteristics that distinguish AOE and Park from any other Arizonan was relevant in identifying the "authorized representatives" of the New Jersey Legislature. Nothing in the case remotely suggests that "authorized" leaders must have authored the

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[12](...continued)

It is also worth noting that *Coleman* involved a challenge to the procedure by which the challenged resolution was declared enacted, rather than the substantive legality of the measure. This distinction may render *Coleman* inapposite in a case like this one regarding the substantive validity of a measure.

legislation at issue or even have voted in favor of it. If those were in fact prerequisites for "authorized representatives," then Karcher's and Orechio's duly-elected successors as Speaker and Senate President would have been, in all likelihood, inappropriate replacements for the former leaders in the litigation challenging the minute-of-silence law. Yet, the Court quite easily concluded that those successors had the sole right to withdraw the New Jersey Legislature's appeal.

It was neither authorship nor support for specific legislation that identified Karcher, Orechio and their successors as "authorized representatives" of the state legislature. Rather, it was their status as Speaker and Senate President -- the duly elected leaders *for all purposes* of the legislative houses. In clear contrast, neither AOE nor Park is an elected leader for any purpose, much less for all purposes, of the body of Arizona voters. A majority of Arizona voters in the 1988 general election did choose to enact a law proposed by AOE and Park, but those voters were never asked whether AOE and Park should act as their leaders or "authorized representative" for any purpose, including defending Article XXVIII.

Had the voters been presented that question, it is far from clear that a substantial number -- or, indeed, any -- of those who voted in favor of Article XXVIII would also have chosen AOE and Park to represent them in defending the law. If asked, some of the "yes" voters might well have concluded that no defense should be mounted at all -- they might have voted for the constitutional amendment for some purpose other than seeing it enforced. *See, e.g.,* Daniel Weintraub, *Crime, Immigration Issues Helped Wilson; Proposition 187 Wins Among Whites, But Loses Among All Other Ethnic Groups, Exit Survey Shows*, L. A. Times, Nov. 9, 1994 (seventy-seven percent of the those who voted for California Proposition 187 indicated they wanted to send "protest message" to federal government). Others might wish

to see Article XXVIII enforced or defended from challenge in some manner radically different from that chosen by AOE and Park. Look no further than the briefing in this case to buttress that proposition. AOE and Park refused to consent to the filing of an amicus brief by U.S. English -- AOE's own sister organization -- because of an apparently serious difference of opinion about how to defend and enforce the law.

Applying the Petitioners' vigorously urged analogy between the body of initiative voters and a true legislature, the true parallel to an assembly speaker or senate president -- like Karcher and Orechio in the *Karcher* case -- is the governor of the state, not an initiative sponsor. Thus, neither AOE nor Park is analogous to the whole state legislature or its "authorized representative"; the reasoning of the *Karcher* decision does not, by analogy or otherwise, confer standing on these lobbyists to defend Article XXVIII.

C. Even if Petitioner Park Is Viewed As An Individual "Legislator," Petitioners Lack Standing

At best, under the strained comparison between the body of all voters in the initiative context and a true legislature, only Petitioner Park can even claim to be an individual lobbyist-legislator. As an organization, AOE is not itself a voter; therefore, under the analogy, it is not even a "legislator." Its only status is that of a lobbying organization. Thus, only Park can claim to be even potentially analogous to an individual "legislator" in the initiative context, but this status does not grant Park Article III standing.

Despite Justice White's statement in Karcher that the issue of individual legislator standing remains open, the issue as presented here has been resolved -- against such standing. If Park is the equivalent of an individual legislator, then this Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986), controls this case.

In *Bender*, the full nine-member school board defended a federal court challenge to its decision not to permit a proposed prayer club to meet on school premises. When the plaintiff student club members prevailed at the District Court, the board voted to forego its right to appeal and to accept the court's decision; only board member John C. Youngman, Jr. dissented. *Id.* at 544. Youngman, named as a defendant in the case in his status as a board member, filed a notice of appeal and prevailed at the Court of Appeals. *Id.* at 539-540. On certiorari, this Court raised, of its own accord, the issue of Youngman's standing to appeal.

The Court held that Youngman had "no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal." *Id.* at 543-44. The Court went on to state that "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 544.

Under Park's own argued analogy -- that in the context of initiatives, voters are the "legislature" -- he is in the exact same position as board member Youngman in *Bender*. Here, the leader of the "legislature," Governor Mofford -- herself a voter-legislator and the chief of the body of Arizona voter-legislators -- determined to accept the District Court's decision and not to appeal. Park, a single member of the "legislative body," disagreed with the decision of the body, as made through its leader, and chose to file his own appeal. Under *Bender*, he lacks the necessary personal stake to pursue such an appeal. Thus, even if individual legislator standing is an open issue in certain contexts, *Bender* forecloses such standing where the legislative body defended a law at the trial court, but then chose to abandon its right to appeal.[13]

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[13] This distinction between *Bender* and *Karcher* may help

(continued...)

Even if *Bender* does not directly control the question of individual "legislator" standing in this context, any open questions about individual legislator standing should be resolved against such standing in the initiative context. The distinctions between actual legislators and voter-legislators are significant, and demonstrate that the analogy urged by AOE and Park cannot support the conferral of standing on individual voters like Park.

Unlike an actual legislator, Park is a "member" of a "legislative" body that never meets to deliberate on proposals, does not have a set membership size, does not hold public sessions, does not have members who are accountable to others for their actions, and does not record the votes of each member. These distinctions suggest why, even if individual legislator standing might be appropriate for actual legislators, its application to voter "legislators" in the initiative context raises more serious difficulties.

For example, because of the use of the secret ballot, every individual's vote on an initiative is secret. Thus, whether any particular "voter-legislator" voted in favor or against a particular proposal is inherently unverifiable. In the often bitterly disputed arena of initiatives, there can be no doubt that some voter-legislators might mischaracterize their actual views and votes in order to seize the right to direct the legal defense of a voter-enacted provision. How, then, could a federal court ensure that the first individual "voter-legislator" who seeks to intervene to defend an

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[13](...continued)
to explain Justice White's statement in his *Karcher* concurrence. In *Karcher*, the two legislative leaders "carried the entire burden of defending the statute" at issue from the first day of litigation. 484 U.S. at 75. Thus, unlike the school board in *Bender*, there was no considered, litigation-based decision to abandon a defense that had been attempted, unsuccessfully, at the trial court level. This case is more like *Bender* than it is like *Karcher*.

initiative is a qualified and appropriate defender? Contests between competing would-be-intervenors about how each actually voted would be inevitable if individual "legislator" standing were permitted in the initiative context. Of course, no similar issue arises as to true legislators, whose votes on legislation are ordinarily a matter of public record.

Second, voter-legislators are accountable to no one. Neither the direction nor intensity of their views are known, and even the amount of knowledge that they have of a particular issue is secret. Real legislators, in contrast, conduct public debate, make public statements, and conduct public hearings and inquiries; in short, their performance as legislators is on display well prior to any actual recorded vote. More important, real legislators are held accountable for that performance. They are subject to election at regular intervals, and they may even be recalled or removed from office prior to a regular election if their inadequate or inappropriate performance warrants it.

Voter-legislators, on the other hand, cannot lose their status except in the most extreme of circumstances. *See, e.g.*, Ariz. Rev. Stat. § 13-904 (conviction for felony suspends right to vote). Even if all of his neighbors, co-workers, and friends conclude that a particular voter-legislator is an extremist crackpot, they cannot expel him from the voter "legislature." This is, of course, one of the great strengths of our democracy: the protection of minority views. However, it also makes individual "legislator" standing to defend laws inadvisable, and likely unworkable, in the context of voter initiatives.

In effect, individual "legislator" standing in the initiative context would open the federal courts to every citizen for the entire length of his or her life. Moreover, there is no meaningful way to distinguish among all of these many "legislators" in according standing. Thus, the extremist crackpot is as much a "legislator" and therefore would enjoy

as much right to intervene and to direct his intervenor litigation as any civic leader. Disputes to determine who should be the lead or sole intervenor would bog down the federal courts for months or years in virtually every case of individual voter-legislator intervention. With real legislators, there are at least a finite number of potential individual intervenor legislators and at least some selection control through voter elections. No such safeguards exist in the initiative context.

The Court's decision in *Bender* forecloses individual "legislator" standing to intervene in cases like this one where the legislative body has elected, through its duly-chosen leadership, to abandon its defense of a law or policy. Moreover, even if individual legislator standing might be appropriate or workable in the context of a real "legislature," it is unworkable in the context of voter initiatives.

D. Article XXVIII's Authorization of a Private Right of Action in State Court -- Essentially Allowing Taxpayer or Citizen Lawsuits -- Does Not Confer Standing Under Article III

AOE and Park assert that section 4 of Article XXVIII -- which recognizes a private right of enforcement of the law in Arizona state courts -- also confers standing under Article III for them to defend the law's constitutionality here. The lobbyists further contend that the private right of enforcement places AOE and Park -- as it would, under this theory, any other "person who resides in or does business in" Arizona -- within the "zone of interests" protected by the initiative constitutional amendment.

Section 4, it is true, reflects the state of Arizona's decision to confer standing on the basis of an abstract value interest in seeing Article XXVIII obeyed; however, that state decision simply cannot confer federal court standing under the Constitution. Were it otherwise, any concerned

bystander could pull himself into federal court by the bootstrap of state-recognized value-interest standing, successfully avoiding the longstanding disfavor of mere value interests.

Article XXVIII is hardly unique in creating a right to pursue abstract value interests in state courts. In fact, even without section 4, it is possible that any state taxpayer could nonetheless have enforced the initiative under Arizona's taxpayer-standing law. *See* Ariz. Rev. Stat. § 35-213 (state taxpayer may take action to enjoin or recover illegal payment of public monies if attorney general fails to take such action). Similar "taxpayer" or "citizen" rights "to air . . . generalized grievances about the conduct of government" appear in the code books or case volumes of most other states. *See Flast v. Cohen*, 392 U.S. 83, 106 (1968) (describing character of most taxpayer actions). In 1968, Justice Douglas noted in *Flast* that all but two of the states allowed taxpayer suits, and that a few openly rested their allowance of such suits on a notion of the taxpayer as "private attorney general seeking to vindicate the public interest." *Id.* at 108 (Douglas, J., concurring).

Yet despite the states' tolerance of private attorney general suits, this Court has steadfastly rejected an abstract generalized "public interest" as conferring Article III standing. Thus, with the limited exception of certain Establishment Clause claims, the Court has held that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing" even if the party claiming standing is a taxpayer. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 477 (1982); *see also United*

States v. Richardson, 418 U.S. 166 (1974), *Frothingham v. Mellon*, 262 U.S. 447 (1923).[14]

The Court has been equally unreceptive to "citizen standing" -- standing based upon harm to "the generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *see also Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (Brandeis, J.) (rejecting suit where "[p]laintiff has only the right, possessed by every citizen, to require that the government be administered according to law, and that the public moneys be not wasted").

Citizen standing, much like taxpayer standing, fails to identify any injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College*, 454 U.S. at 485. The Court, articulating "unambiguous limitations on taxpayer and citizen standing," has long concluded that abstract, generalized value injuries are insufficient to satisfy Article III. *See Id.* at 488; *see also Richardson*, 418 U.S. at 192 (Powell, J., concurring) ("It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government.").

Nearly half a century ago, the Court ruled that it could not, and would not, relax these strict rules against citizen and taxpayer standing merely because a state chooses to recognize such standing in its own courts. In *Doremus v.*

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[14] Even the Establishment Clause exception has been greatly restricted. "Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge Christian College*, 454 U.S. at 487.

Board of Educ. of Hawthorne, 342 U.S. 429 (1952), the Court declined to exercise jurisdiction over an action appealed from the Supreme Court of New Jersey, where the appellants' standing in state court rested solely on their status as citizens and taxpayers.

The Court concluded that what is true of federal taxpayers -- that their interests are "too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the . . . powers of the Court" -- was equally true for the appellants, regardless of the jurisdiction exercised by the New Jersey courts. *Id.* at 433; *cf. Tileston v. Ullman*, 318 U.S. 44 (1943) (per curiam) (dismissing appeal by doctor raising interests of patients despite Connecticut courts' exercise of jurisdiction).[15]

The decision in *Doremus* establishes that a state's allowance of value-based standing for citizens and taxpayers does not render those value interests any more significant for purposes of Article III. Thus, Petitioners' reliance on a single oblique footnote in *Diamond* is misplaced. In light of *Doremus* and the myriad other cases rejecting federal-court standing of private attorneys general, the Court's reference in *Diamond* to state-created "new interests, the invasion of which may confer standing," *Diamond*, 476 U.S. at 65 n. 17, could hardly have referred to private enforcement

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[15] Even before *Doremus*, in *Coleman v. Miller*, 307 U.S. 433 (1939), Justice Frankfurter, writing for four justices, rejected the notion that a state court's recognition of "an undifferentiated, general interest" could confer jurisdiction on the federal court. *Id.* at 466 (Frankfurter, J., concurring). "To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. But Kansas cannot define the contours of the authority of the federal courts, and more particularly of this Court." *Id.* at 462 (Frankfurter, J., concurring) (footnote omitted).

authorizations like section 4.[16] Private attorneys general are strangers to the federal courts, and state value-based standing laws can make them no more familiar.

If adopted, however, AOE's and Park's theory that section 4 confers Article III standing on any Arizona resident would reverse all of this well-established jurisprudence. The theory would also open the federal courts to a tidal wave of new litigation previously barred from our federal courts of limited jurisdiction. None of the many states with some form of private attorney general standing doctrine could ever expect to make a decision against appealing a court ruling without some "citizen," "taxpayer," or "resident" intervening to protect his or her "right" to enforce the state law at issue. Given the likely plethora of willing government second-guessers, appeals would become virtually automatic, and the burden on overloaded federal courts correspondingly incredible.[17]

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[16] The fact that the Court has also rejected a *federal* private enforcement statute as creating standing makes AOE's reading of footnote 17 in *Diamond* even more unlikely. In *Valley Forge Christian College*, the Court rejected an attempt to rest standing on 5 U.S.C. § 702: "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." 454 U.S. at 487 n. 24.

[17] Nor would the limiting principle adopted by the Ninth Circuit constitute much of a limit at all. That court required some indication, beyond mere speculation, that Park would use the private right of action in section 4 to enforce Article XXVIII. *JA.* at 169, 939 F.2d at 734. That is not a difficult burden; any citizen could easily raise such a credible threat by an appropriate affidavit. Indeed, here, the Ninth Circuit simply *assumed* such a threatened enforcement action, without any affidavit, on the basis of an expression of interest by Park in the litigation. *See id.* That threshold -- mere expression of interest in the pending litigation -- would present no barrier at all; presumably, an attempt at intervention by a "taxpayer," "citizen," or

(continued...)

Moreover, because section 4, and other private attorney general statutes like it, express no preference among "residents," "citizens," or "taxpayers," the quality and appropriateness of such intervenor-filed appeals would be erratic at best -- often determined by a race to the courthouse among would-be intervenors. *See Richardson*, 418 U.S. at 189-91 (Powell, J., concurring) (uneven nature of taxpayer suits).

The fifty states' many broad and divergent standing doctrines are not magical master keys to open long-locked doors to the Article III courts. Section 4 does not confer federal-court standing on AOE, Park, or any of the other Arizona residents covered by it.

CONCLUSION

For these reasons, the Court should vacate certiorari as improvidently granted. Furthermore, for the reasons stated in the brief of Respondent Yniguez, vacatur of the lower court opinion is not appropriate.

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[17](...continued)
"resident" would itself satisfy the test.